Fair Up or Down Vote

May 9, 2005

Noteworthy
"An offer to confirm any one of those four nominees is an explicit concession that each is qualified for the court and that they are being held hostage as pawns in a convoluted chess game which has spiraled out of control. If the Democrats really believe each is unqualified, a "deal" for confirmation for any one of them is repugnant to the basic democratic principle of individual, fair and equitable treatment and violates Senators' oaths on the constitutional confirmation process." **Senator Specter**, Floor Statement, 5/09/05

"If you pull the curtains back, what this is about is that these judges hold conservative views … It is a political litmus test they have erected. ... It used to be that when the American Bar Association said you were qualified, that was the gold standard." **Senator Thune**, "'Nuclear Option' A Divisive Issue," *Rapid City Journal*, 5/9/05

Floor Statement of Senator Specter

May 9, 2005
FLOOR STATEMENT OF
SENATOR ARLEN SPECTER
ON AVOIDING THE NUCLEAR OR CONSTITUTIONAL OPTION

Mr. President, I seek recognition to urge my colleagues to explore ways to avoid a Senate vote on the nuclear or constitutional option. It is anticipated that we may vote this week or this month to reduce from 60 to 51 the number of votes to invoke cloture or cut off debate on judicial nominations. If the Senate roll is called on that vote, it will be one of the most important in the history of this institution.

The fact is that all, or almost all, Senators want to avoid the crisis. I have had many conversations with my Democratic colleagues about the filibuster of judicial nominees. Many of them have told me that they do not personally believe it is a good

idea to filibuster President Bush's judicial nominees. They believe that this unprecedented use of the filibuster does damage to this institution and to the prerogatives of the President. Yet despite their concerns, they gave in to party loyalty and voted repeatedly to filibuster federal judges in the last Congress. Likewise, there are many Republicans in this body who question the wisdom of the constitutional or nuclear option. They recognize that such a step would be a serious blow to the rights of the minority that have always distinguished this body from the House of Representatives. Knowing that the Senate is a body that depends upon collegiality and compromise to pass even the smallest resolution, they worry that the rule change will impair the ability of the institution to function.

I have repeatedly heard colleagues on both sides of the aisle say it is really a matter of saving "face"; but, as yet, we have not found the formula to do so. I suggest the way to work through the current impasse is to proceed to bring to the floor circuit nominees one by one for up or down votes. There are at least five and perhaps as many as seven pending circuit nominees who could be confirmed; or, at least voted up or down.

If the straight jacket of party loyalty were removed, even more might be confirmed. For the past four months since becoming Chairman of the Judiciary Committee, my first priority has been to process the nominees though Committee to bring them to the floor. As a starting point, it is important to acknowledge that both sides, Democrats and Republicans, have been at fault. Both sides claim that they are the victims and that their party's nominees have been treated worse than the other's. Both sides cite endless statistics. I have heard so many numbers spun so many different ways that my head is spinning. I think even Benjamin Disraeli, the man who coined the phrase, "there are lies, damned lies and statistics," would be amazed at the creativity employed by both sides in contriving numbers in this debate.

In 1987, upon gaining control of the Senate and the Judiciary Committee, the Democrats denied hearings to seven of President Reagan's circuit court nominees and denied floor votes to two additional circuit court nominees. As a result, the confirmation rate for Reagan's circuit nominees fell from 89% prior to the Democratic takeover to 65% afterwards. While the confirmation rate decreased, the length of time it took to confirm judges increased. From the Carter Administration through the first six years of the Reagan Administration, the length of the confirmation process for both district and circuit court seats consistently hovered at approximately 50 days. For Reagan's final Congress, however, the number doubled to an average of 120 days for these nominees to be confirmed.

The pattern of delay and denial continued through four years of President George H.W. Bush's administration. President Bush's lower court nominees waited, on average, 100 days to be confirmed, which was about twice as long as had historically been the case. The Democrats also denied committee hearings for more nominees. President Carter had 10 nominees who did not receive hearings. For President Reagan, the number was 30. In the Bush Sr. Administration, the number jumped to 58.

When we Republicans won the 1994 election and gained the Senate majority, we exacerbated the pattern of delaying and blocking nominees. Over the course of President Clinton's presidency, the average number of days for the senate to confirm judicial nominees increased even further to 192 days for district court nominees and 262 days for circuit court nominees. Through blue slips and holds, sixty of President Clinton's nominees were blocked. When it became clear that the Republican-controlled Senate would not allow the nominations to move forward, President Clinton withdrew twelve of those nominations and chose not to re-nominate sixteen.

After the 2002 elections with control of the Senate returning to Republicans, the Democrats resorted to the filibuster on ten Circuit Court nominations, which was the most extensive use of the tactic in the nation's history. The filibuster started with Miguel Estrada, one of the most talented and competent appellate lawyers in the country. The Democrats followed with filibusters against nine other circuit court nominees. During the 108th Congress, there were twenty cloture motions on ten nominations. All twenty failed. To this unprecedented move, President Bush responded by making for the first time in the nation's history two recess appointments of nominees who had been successfully filibustered by the Democrats. That impasse was broken when President Bush agreed to refrain from further recess appointments.

Against this background of bitter and angry recriminations with each party serially trumping the other party to "get even" or, really, to dominate, the Senate now faces dual threats, one called the filibuster and the other the constitutional/nuclear option, which rival the US/USSR confrontation of mutual assured destruction. Both situations are accurately described by the acronym "MAD".

We Republicans are threatening to employ the "constitutional" or "nuclear" option to require only a majority vote to end filibusters. The Democrats are threatening to retaliate by stopping the Senate agenda on all matters except national security and homeland defense. Each ascribes to the other the responsibility for "blowing the place up". The gridlock occurs at a time when we expect a United States Supreme Court vacancy within the next few months. If a filibuster would leave an eight-person court, we could expect many four to four votes since the court now often decides cases with five to four votes. A Supreme Court tie vote would render the Court dysfunctional leaving in effect the Circuit Court decision with many splits among the Circuits, so the rule of law would be suspended on many major issues.

In moving in the Judiciary Committee to select nominees for floor action, I first selected William Myers because two Democrats had voted in the 108 th Congress not to filibuster him and one candidate for the Senate in 2004, since elected, made a campaign statement that he would vote to end the Myers filibuster and to confirm him. Adding those three votes to 55 Republicans, we were within striking distance to reach 60 or more. I carefully examined Myers' record. Noting that he had opposition from some groups such as Friends of the Earth and the Sierra Club, it was my conclusion that his environmental record was satisfactory, or at least not a disqualifier as detailed in my statement at the

Judiciary Committee Executive Session on March 17, 2005. To be sure, critics could pick at his record as they could on any senator's record; but overall Mr. Myers was worthy of confirmation. I then set out to solicit others' views on Myers including the ranchers, loggers, miners, and farmers. In those quarters, where I found significant enthusiasm for the Myers confirmation, I urged them to have their members contact senators who might be swing votes. I then followed up with personal talks to many of those senators and found several prospects to vote for cloture. Then, the screws of party loyalty were applied and tightened and the prospects for obtaining the additional few votes to secure cloture vanished. I am confident that if the party pressure had not been applied, the Myers filibuster would have ended and he would have been confirmed. That result could still be obtained if the straight jacket of party loyalty were removed on the Myers nomination.

Informally, but authoritatively, I have been told that the Democrats will not filibuster Thomas Griffith or Judge Terrence Boyle. Griffith is on the Senate calendar awaiting floor action and Boyle is on the next agenda for committee action. Both could be confirmed by mid-May.

There are no objections to three nominees from the state of Michigan for the Sixth Circuit: Richard Griffin, David McKeague and Susan Bakke Neilson; but their confirmations are held up because of objections to a fourth nominee. I urge my Democratic colleagues to confirm the three uncontested Michigan Sixth circuit nominees and fight out the fourth circuit vacancy and Michigan district court vacancies on another day. The Michigan Senators make a valid point on the need for consultation on the other Michigan vacancies and that can be accommodated.

In the exchange of offers and counter offers between Sen. Frist, the Majority Leader and Sen. Harry Reid, the Democrat Leader, Democrats have made an offer to avoid a vote on the nuclear/constitutional option by confirming one of the four filibustered judges: Priscilla Owen, Janice Rogers Brown, William Pryor and William Myers with the choice to be selected by Republicans.

An offer to confirm any one of the those four nominees is an explicit concession that each is qualified for the court and that they are being held hostage as pawns in a convoluted chess game which has spiraled out of control. If the Democrats really believe each is unqualified, a "deal" for confirmation for any one of them is repugnant to the basic democratic principle of individual, fair and equitable treatment and violates Senators' oaths on the constitutional confirmation process. Such "deal" making confirms public cynicism about what goes on behind Washington's closed doors.

Instead, let the Senate consider each of the four without the constraints of party line voting. Let us revert to the tried and tested method of evaluating each nominee individually.

By memorandum dated April 7, 2005, I circulated an analysis of Texas Supreme Court Justice Priscilla Owen's record demonstrating she was not hostile to Roe vs. Wade and that her decisions were based on solid judicial precedent. No one has challenged that legal analysis.

By memorandum dated January 12, 2005, I distributed an analysis of decisions by Judge William Pryor, which shows his concern to protect the rights of those often overlooked in the legal system. Similarly, no on has refuted that analysis.

California Supreme Court Justice Janice Rogers Brown has been pilloried for her speeches. If political or judicial officials were rejected by provocative/extreme ideas in speeches, none of us would hold public office.

The fact is that the harm to the Republic, at worst, by the confirmation of all pending circuit court nominees is infinitesimal compared to the harm to the Senate, whichever way the vote would turn out, on the nuclear/constitutional option. None of these circuit judges could make new law because all are bound, and each one agreed on the record, to follow U.S. Supreme Court decisions. While it is frequently argued that the circuit court opinions are in many cases final because the Supreme Court grants certiorari in so few cases, circuit courts sit in panels of three so that no one of these nominees can unilaterally render an unjust decision since at least one other circuit judge on the panel must concur.

While it would be naïve to deny that the "quid-pro-quo" and "log rolling" are not frequent congressional practices, those approaches are not the best way to formulate public policy or make governmental decisions. The Senate has a roadmap to avoid the "nuclear winter" in a principled way. Five of the controversial judges can be brought up for up or down votes on this state of the record. The others are entitled to individualized treatment on the filibuster issue.

It may be that the opponents of one or more of these judges may persuade a majority of senators that confirmation should be rejected. A group of Republican moderates has, with some frequency, joined Democrats to defeat a party line vote. The President has been explicit in seeking up or down votes as opposed to commitments on confirmations.

The Senate has arrived at this confrontation by "exacerbation" as each side ratcheted up the ante in delaying and denying confirmation to the other party's Presidential nominees. A policy of conciliation/consultation could diffuse the situation. Some has already been offered by the Democrats informally signaling their intentions not to filibuster Griffith or Boyle. Likewise, it has been reported that Senator Reid has privately told Republicans that he doesn't intend to block votes on any Supreme Court nominees, except in extreme cases. A public statement with an amplification on what constitutes an "extreme case" could go a long way.

Sen. Schumer praised White House Counsel Gonzalez's consultation with him on President Bush's judicial nominees. On April 11, 2005, the President's nominee for the

U.S. District Court for the Southern District of New York, Paul Crotty, supported by Senator Schumer, was confirmed. Both New Jersey Senators, Bob Torricelli and Jon Corzine, approved all five district court nominations for their state in the 107th Congress. In the 107 th Congress, Florida's Democratic Senators, Bob Graham and Bill Nelson, appointed representatives to a Commission which recommended federal judges to President Bush.

President Bush recently nominated Minority Leader Harry Reid's pick for the U.S. District Court for the District of Nevada. I have reason to believe the President is considering consultation with the Michigan Senators on some federal judicial vacancies in their state and perhaps beyond.

One good turn deserves another. If one side realistically and sincerely takes the high ground, there will be tremendous pressure on the other side to follow suit. So far, the offers by both sides have been public relations maneuvers to appear reasonable to avoid blame and place it elsewhere. Meanwhile, the far left and the far right are urging each side to shun compromise: pull the trigger; filibuster forever. Their approaches would lead to extreme judges at each end of the political spectrum as control of the Senate inevitably shifts from one party to the other.

The United States Senate today stands on the edge of the abyss. Institutions like the Senate are immortal but not invulnerable. If we fail to step back from the abyss, we will descend into a dark, protracted era of divisive partisanship. But if we cease this aimless game of political chicken, we can restore the Senate to its rightful place as the world's greatest deliberative body. That will require courage. Courage from each senator. Courage to think and act with independence. Our immortal Senate is depending on our courage. Do we have it? Since the US and USSR avoided a nuclear confrontation in the cold war by concessions and confidence building measures, why couldn't Senators do the same by crossing the aisle in the spirit of compromise.